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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 61.

E. S. EVANS, et al.,

v.

CHARLES E. NEWTON, et al.,

On Writ of Certiorari to the Supreme Court of Georgia.

BRIEF

Of Respondents, Members of the Board of Managers of Baconsfield.

QUESTIONS PRESENTED.

Here certain land was devised in trust for a park for white persons only. The testator by clear language manifested a disapproval of the idea of any recreation area being open to the members of both the white and negro races. The legal title was to be held by the City of Macon

or its successors in said trust, subject to control by a Board of Managers, composed of private citizens selected as provided in the will.

When negro citizens began to use the park's facilities, the Mayor and Council of the City by formal resolution after institution of suit to remove the City as trustee resolved to resign, declaring it to be "against good conscience" that the City should attempt to remain as title holder to the trust property.

Under these circumstances where the City tenders its resignation as trustee to a court of equity, whether in the midst of litigation seeking its removal or otherwise, is it a denial of constitutional rights of negro citizens of the community for the court to appoint successor trustees and to refuse to command the city to continue to serve?

STATEMENT.

Augustus Octavius Bacon was a soldier in the service of the Confederate States of America and later for twenty (20) years a United States Senator from Georgia. Before his death in 1914, he served for a time as President Pro Tempore of the Senate of the United States. The following quoted excerpts from Items Ninth and Tenth of his will are of crucial importance in evaluating the action of the Supreme Court of Georgia:

> ". . . it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all

vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as at first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person or persons of either sex, who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property the white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangments, I direct that said Board may use for purposes of income in

any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield (more particular description of property omitted), but in no event and under no circumstances shall any part of the property herein conveyed and bounded and platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified . . ." (R. 19-20).

". . . I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection (R. 21).

"I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified by my gratitude to and love for the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December, 1884, and Augustus Octavius Bacon, Jr., who died on the 27th day of the same year. And I conjure all of my descendants to the remotest generation as they shall honor my

memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated . . ." (R. 21).

". . . If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the Charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their Charter to hold in trust for the purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation . . ." (R. 23-24).

". . . As there will be no one of my descendants who now bears my name either by right of birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community of which they once formed a happy part . . ." (R. 24-25).

The will from which the foregoing excerpts were taken was duly probated in solemn form in the Court of Ordinary of Bibb County, Georgia in 1914. After the death of certain life tenants, Baconsfield came into being. Since

the earliest beginnings of this park the Board of Managers has operated it in strict accordance with all of the requirements of Bacon except that for a brief time in the spring of 1963 groups of negro citizens entered the park and began to use the limited facilities there located.

The use of the park's facilities by negro citizens in the spring of 1963 was called to the attention of the City by the Board of Managers (R. 8). The City did not then resign, and the Board of Managers initiated this litigation by filing its petition (R. 5-10) in the Superior Court of Bibb County, Georgia on May 4, 1963, seeking to have the City removed as trustee of Baconsfield.[1] The sole reason for the Board's desire to remove the City was that the Board could not operate Baconsfield for the exclusive benefit of white persons as required by the will while the City held the legal title as trustee.

Also joined as defendants were Guyton Abney et al., as trustees holding certain properties for residuary beneficiaries of Mr. Bacon's estate, i. e., the "Curry heirs".

The City filed an answer (R. 32) declaring its inability to serve as trustee of a charitable trust for the members

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[1] On page 8 of their brief petitioners refer to the actions of the Mayor and Council of the City of Macon as representing "a glaring illustration of state action to enforce segregation". They repeat this theme over and over, as do counsel for the United States. Such statements are totally unwarranted.

The City of Macon enjoys an excellent reputation as a municipality in the field of race relations, and the Mayor and Council have always acted with the utmost responsibility to see that all of the City's citizens have been unhampered in the enjoyment of any rights guaranteed by federal law. Few, if any, cities have a better record in this regard.

Nor did the City as trustee act to enforce "segregation" at Baconsfield. Rather, it is apparent that this suit arose only because when Negroes first sought admission at Baconsfield in 1963 the City acted just as it acts in relation to its own parks. As appears from paragraph 10 (R. 8) of the Board's petition the City was "permitting the continuous use of said premises by members of the colored race . . . in complete disregard and violation of the explicit mandate of the testator . . ."

of one race. It prayed that the Court enter a decree setting forth its obligations and duties under the circumstances (R. 34). The trustees for the Curry heirs filed an answer admitting all of the allegations of the plaintiffs, members of the Board of Managers, and also praying for the removal of the City as trustee.

Thereafter on May 27, 1963 the Board of Managers filled a motion for summary judgment on the pleadings (R. 35).

On May 29, 1963, six negro citizens of Macon, Georgia who are the petitioners in this Court, moved to be allowed to intervene in the proceeding (R. 36), and their motion was granted. In paragraph 2 of their motion (R. 37), they alleged that if the prayers of the plaintiffs were granted they and other negro residents of the City of Macon similarly situated would be irreparably harmed and damaged in that they would be deprived of the use of the park. On June 18, 1963 they filed an "Intervenors' Petition" (R. 38) on behalf of themselves and "other Negroes similarly situated as a class". They maintained that the Board of Managers was an agency of the City (R. 39), that the racial limitation in the will was violative of the public policy of the United States and of the Constitution and laws of Georgia, that the Superior Court would violate the Equal Protection Clause of the Fourteenth Amendment if it appointed private successor trustees "who in such capacity as trustees could operate and maintain Baconsfield Park upon a segregated basis". As a "Second Answer and Defense" (R. 41) they stated that while a racially restricted charitable trust could have been enforced in the courts at the time of the probate of Bacon's will, such was no longer the case because the law "has changed". Finally, they prayed (R. 41) that the Court not remove the City but rather that it effectuate "the general charitable purpose" of the testator to establish a "public park".

On January 8, 1964, the "Sparks heirs" were allowed to intervene (R. 45), and they prayed that the City be removed as trustee. As a secondary prayer they asked that unless some order should be granted assuring the future use of Baconsfield in accordance with the will of Bacon with regard to the racial limitation, the property be held to revert into the estate. On the same day the trustees for the "Curry heirs" made the same requests (R. 47). Both sets of heirs requested that negro citizens of the community be permanently enjoined from entering the premises of Baconsfield, and the Board of Managers also concurred in this prayer for an injunction (R. 43).

Thereafter on February 4, 1964, the Mayor and Council of the City of Macon by formal resolution (R. 51-61) determined to resign as trustee of Baconsfield, stating (R. 61), that "it is the considered opinion of the Mayor and Council that it is against good conscience for the City of Macon to continue to serve as Trustee under said will under circumstances where as such trustee it cannot carry out the plain and unambiguous terms of the trust". On the following day the City of Macon amended its answer, thereby resigning the trust (R. 50-62).

On March 5, 1964, petitioners as intervenors in the Superior Court of Bibb County, Georgia, amended their petition (R. 63), reiterating their position that the appointment of private trustees would deny them the equal protection of the laws. They further contended that Bacon's racial limitation "was dictated" by Georgia Code, Section 69-504, which statute they alleged to be unconstitutional. They stated that Georgia Code, Section 108-202 (dealing with cy pres), required that the "racially discriminatory provision" in the will be declared null and void.

On March 10, 1964, the judge of the Superior Court entered an order (R. 64) reciting that the City of Macon

having submitted its resignation as trustee of Baconsfield, the resignation was accepted by the Court, and under the principle that a trust should never fail for want of a trustee, it became the duty of the Court to appoint new trustees to serve in lieu of the City of Macon. The Court thereupon appointed three private citizens to serve in that capacity. No injunctive relief was granted. It was deemed unnecessary to pass upon the secondary contentions of the heirs as to a possible reversion. The Court retained jurisdiction for the limited purpose of replacing any one of the three trustees who might be unable to serve.

These three persons accepted the trust (R. 67), and no supersedeas having been obtained by any party wishing to appeal from that judgment, they quite rightly entered upon their duties as trustees of Baconsfield. As set out in a motion to substitute parties defendant in error filed in the Supreme Court of Georgia (R. 70-76), the members of the Board of Managers as constituted at the outset of this litigation submitted their resignations in writing to the new trustees (R. 73). Subsequently the three successor trustees accepted the resignation of the Board members (R. 74) and appointed a new Board including four persons who had never served in that capacity at any previous time. Thereafter the seven newly appointed persons accepted their appointment to the Board of Managers in writing (R. 75).

Those who are petitioners here prosecuted an appeal to the Supreme Court of Georgia. In their Bill of Exceptions (R. 1) they contended that the trial court's order denied equal protection to them and to the class they represented because it "has the effect of prohibiting Negroes from the use of the park" and because it had the effect of enforcing racial clauses which they contended were originally "commanded" by the State through Georgia Code Section 69-504. They further contended that Georgia Code Section 108-202 (one of two Georgia

Code Sections dealing with cy pres) required that the racial limitation be declared void. The City of Macon filed no brief and made no appearance.

On September 28, 1964, the Georgia Supreme Court unanimously affirmed the decision of the Superior Court of Bibb County (R. 81-88). A rehearing was denied without any opinion on October 8, 1964 (R. 92).

In closing our factual statement we wish to comment on a map attached to the back cover of the brief filed on behalf of the United States. Baconsfield may be observed by looking down from the letter "G" and by looking across from the numeral "5". This was not, of course, a part of the record in the case. In the event that the Court should choose to examine this map, we wish to make certain statements about its accuracy.

This map gives the impression that Baconsfield is traversed by a United States highway. Indeed, counsel for the United States have so construed the map in their brief. Actually, this highway is not now and never has been open but is in a state of preparation. Furthermore, it lies entirely outside of the developed area of Baconsfield Park. The green area on the map which would appear to be labeled "Baconsfield Park" covers a great deal more than the developed park area. That green area from the point where it touches the river going north to a point beyond the proposed highway has been for many years an undeveloped area of river bottom subject to periodic flooding. It is through this area that the highway will lie. This is not and cannot economically be made a part of the park.

Mr. Bacon may have held title to all of that area down to the river, but the park extends only a few feet south of the road labeled "W. G. Lee Boulevard". Nor are there any proposed road connections between this highway and Baconsfield. Nor does any part of Baconsfield

lie to the east of the bridge crossing the river, though the map seems to include another small undeveloped area adjacent to the river and east of the said bridge.

THE BOARD OF MANAGERS OF BACONSFIELD.

The Board of Managers of Baconsfield, the plaintiff in the trial court, has been continually referred to by petitioners as an agency of the City of Macon. Counsel for the United States at page 24 of their brief go so far as to call the Board "a part of the city administration". Nothing in the record or in the facts as they exist outside the record justifies such characterization of the Board, which indeed is totally foreign to the reality of the situation.

The Board is not the agent of the City but of Mr. Bacon. He created the Board in his will (R. 19) and prescribed its membership and its duties and functions. It would always have seven members, all of whom would be white, four of whom would be women and one of whom where practicable would be one of his descendants. The City's only tie was that the Mayor and Council should appoint the original Board at his direction, and the City or any successor trustee should fill vacancies on the Board upon "nomination" made by the Board and "approved" by the trustee (R. 19). The will does not give the Mayor and Council or any trustee or trustees who might succeed it any power to remove a Board member. Rather such members serve for life or until they see fit to resign. They are not, and have not been, compensated by the City or anyone else.

Of vital significance is the fact that the City as the passive title holder exercised no control over this Board. Rather the Board had (R. 19) at all times the complete and unrestricted control and management of the property with power to make all needful regulations for its preservation and its use and enjoyment. Also, the Board, rather

than the City, was supplied with independent income from the trust properties for the payment of necessary expenses for management, improvement and preservation of the park (R. 20). The Board is given the power to exclude any person of either sex deemed objectionable by the Board (R. 19). In none of its duties is it made answerable to the trustee.

The Petition for Certiorari suggested at page 12, in what counsel admitted was a presumption, that until this litigation the Board had been represented in its legal affairs by the City Attorney. However, the Board has at no time been represented by the City Attorney, but in all of its legal affairs, such as leasing the Bacon property which provides the income for the upkeep of Baconsfield, it has been represented by private counsel. In making this statement, we step outside the record, but we fear that we must answer or be thought to acquiesce.[2]

If we concede that any body appointed by another is to be considered henceforth as its servant without any regard to the question of any right of control, then we reach the untenable conclusion that this Court is a mere agency of the President of the United States.

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[2] Augustus Octavius Bacon Sparks, a grandson of the testator, was until his death in the spring of 1964 a member of the firm presently representing the Board of Managers in this litigation. He had always taken great pride in his illustrious grandfather and great interest in the development and operation of Baconsfield. He had for many years served as counsel for the Board of Managers. When his health declined, the Board looked to other members of his firm.

Petitioners attribute some significance to the fact that this firm, i. e., Jones, Sparks, Benton & Cork, also represented the Sparks heirs and the trustees for the Curry heirs in this case. However, it was only natural that these descendants of the Senator in their desire to see his will respected in the courts should look to the firm with which they had family ties. A. O. B. Sparks, Jr. is a member of the firm also, and Willis B. Sparks, III, another great-grandson of Senator Bacon, is associated there in the practice of law.

Petitioners and the United States rely on **Pennsylvania v. Board of Trusts,** 353 U. S. 230, for their assertion that the Board of Managers is an agency of the City. But the Board of Directors of City Trusts there involved was created by the Pennsylvania General Assembly by an Act of June 30, 1869. That Act made the Board of City Trusts answerable to the State of Pennsylvania for all of its actions, and described it as a part of the City government of Philadelphia.[3] The Mayor and the Presidents of the Select and Common Councils served on the Board. The Board administered not just the Girard trust but all eighty-nine charitable trusts of which the City of Philadelphia was trustee (See 127 A. 2d 287). Its correspondence bore the letterhead of the City, and the treasurer of the City of Philadelphia was the treasurer of the Board.

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[3] Justice Musmanno dissenting *In Re Girard's Estate,* 386 Pa. 548, 127 A. 2d 287 (1957), said at 127 A. 2d 322 and 323:

> "Through this Board and through periodical examinations, visits, and audits, the General Assembly maintains a direct supervision over the College and its activities. The Board is required to report annually to the City Council, to the State Legisature, and to the Court of Common Pleas, publishing its reports in the Philadelphia newspapers. The City Controller is required to audit the accounts. The Act makes the members of the Board city officers . . . How can it be doubted that in creating the Board of City Trusts the General Assembly intended to bring into being a governmental agency? The enabling Act provided that all duties, rights and powers of the City of Philadelphia with respect to property dedicated to charitable uses or trusts are to be discharged by the City 'through the instrumentality of a Board composed of fifteen persons including *the mayor of said city, the presidents,'* etc., 'who shall exercise and discharge *all the duties and powers of said city . . .*'. The Board is directed *'in the name of the . . . City . . .* to make all necessary arrangements, and for and *in the name of the said City* to do, perform and discharge,' all necessary acts in the discharge of the trust. And then, as if to eliminate the possibility of questions in the future as to the authority of the Board, the Act specifically declares that 'the said directors, in the discharge of their duties, and within the scope of their powers aforesaid, *shall be considered agents or officers of said city*' . . ." (Emphasis is that of the Pennsylvania justice.)

However, even if the Board of Managers of Baconsfield as constituted at the outset of this litigation were deemed a state agency, its action may not be viewed as state action denying any "rights" of petitioners since they have no "rights" in regard to Baconsfield. Further, the removal of the City as trustee was also prayed for by Bacon's heirs. Counsel for the United States suggest that heirs may not enforce a charitable trust. But see **McGee v. Vandeventer,** 326 Ill. 425, 158 N. E. 127 (1927). Nor can it matter who were parties plaintiff in Bibb Superior Court, since the Mayor and Council resigned, an action which the City might have taken at any time without any suit at all having been filed.

Further, petitioners, in appealing from Bibb Superior Court to the Supreme Court of Georgia from the order appointing private trustees, obtained no supersedeas. Therefore it was quite proper for the three new trustees to begin functioning as such. As already noted, when the Board of Managers which had filed this action tendered its resignation to the new trustees (R. 73), they accepted that resignation (R. 74) and thereafter appointed a new Board of Managers (R. 74) of whom four members had never served on the Board at any previous time. These four persons were made parties defendant in error in the Supreme Court of Georgia (R. 79). Consequently, the Board of Managers as it presently exists has not even that slight tie with the City which petitioners formerly claimed to exist through the appointments.

Counsel for the United States in the footnote on page 25 of their brief speculate that perhaps the beneficiaries were content with the City's trusteeship since they didn't sue.

However, those who favored the City's removal were represented by the Board of Managers. There was no reason for them to sue. If any favored the view of petitioners they were free to join with them, but not a single member of that large class did so.

THE SCOPE OF THE GEORGIA SUPREME COURT'S DECISION.

While we think that the present Board of Managers of Baconsfield under an appointment by private persons serving as trustees may operate the park for the exclusive benefit of the class of persons clearly intended and defined as beneficiaries of Senator Bacon's will, and that a decision of the Georgia Supreme Court so holding would be correct and would not raise any federal question, we do not think the Georgia Supreme Court reached that question. At the beginning of its decision that Court carefully analyzed (R. 85-86) the action of Bibb Superior Court, and said:

> ". . . After determining that all parties were properly before the Court, the decree did two things: (1) Accepted the resignation of the City of Macon as trustee of Baconsfield; and (2) appointed new trustees."

The Georgia Supreme Court observed (R. 85) that those who are petitioners here asserted in that Court that the trial judge's decree was "patent enforcement of racial discrimination contrary to the equal protection clause of the Fourteenth Amendment," but, said the Court (R. 85):

> ". . . The decree did not enforce, or purport to enforce, any judgment, ruling, or decree as related to the intervenors . . ."

(The intervenors referred to are, of course, the petitioners here.)

In this manner the Georgia Supreme Court made it clear what limited action of the trial court it was called upon to review, and what would be the scope of its decision.

It then applied normal rules of trust law, observing (R. 86) that the trustee had resigned, and that the trial judge "was confronted with the commandment of Code

Section 108-302 that a trust shall never fail for the want of a trustee" and "being empowered to appoint trustees when a vacancy occurs for any cause" he appointed successors.

It is true that the Court observed (R. 87) that "A. O. Bacon had the absolute right to give and bequeath property to a limited class." But this must be read in light of the preceding sentence where the Court says that racial limitations in gifts "standing alone" are not invalid.

Then to remove any lingering doubts about the limits of its decision the Court noted further (R. 87):

> ". . . the facts before the trial judge were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of exact execution in the exact manner provided by the testator . . ."

Finally at the close of the opinion (R. 88) the Court said:

> ". . . In so far as the **Girard College Trusteeship** case is applicable on its facts to the present case, it supports the rulings we have made."

In expressing doubt as to the applicability to the facts of this case of the Supreme Court of Pennsylvania's decision in the **Second Girard College Case**, i. e., **In Re: Girard College Trusteeship**, 391 Pa. 434, 138 A. 2d 844 (1958), appeal dismissed and certiorari denied, 357 U. S. 570, the Court again obviously had in mind that while the **Second Girard College Case** involved a review of actions in which private trustees excluded Negroes from Girard College, the instant case involved only the resignation of a trustee.

In summary then, the Georgia Supreme Court's decision rests on independent state grounds having a fair and

substantial basis. No federal question has been decided, nor has state law been applied in any unusual fashion to defeat claims of federal rights.

It was unnecessary for the Georgia Supreme Court to ponder whether Baconsfield may be operated solely for white persons. For regardless of the answer to that question the City might still resign. No principle of law requires that every charity open to all races have a municipal corporation as trustee. Hence any decision by this Court on that broader question would be a mere advisory opinion. **Murdock v. Memphis**, 20 Wall. 590.

Petitioners and the United States both say, in arguments with which we totally disagree, that the Board of Managers may not operate Baconsfield exclusively for white persons even with private trustees holding the legal title. Hence also under their view of the case there is no reason for this Court to render a decision on the propriety of the change in trustee.

In view of this Court's grant of certiorari we will, of course, argue in this brief the broader question of whether or not Baconsfield may be operated for the exclusive benefit of white persons. However, we respectfully repeat herein, perhaps with greater clarity, the position taken in opposition to certiorari and wish to make further argument without abandoning that position.

SUMMARY OF ARGUMENT.

Since **Trustees of Dartmouth College v. Woodward,** 4 Wheat. 518, it has been recognized that charitable trusts have an existence free from governmental control, and this is true though the trust may perform functions also performed by the State.

The Fourteenth Amendment makes no reference to race. It prohibits the states from making any purely arbitrary classifications. Thus, if a charity for the members of one race is invalid, so is a charity for the members of a particular religious group.

A decision such as is desired by petitioners would strike a terrible blow to the law of charitable trusts, for the creation of a charity is entirely dependent upon the faith of the prospective donor that the disposition he makes of his property is immutable, and that his bounty will flow forever in accordance with his intent.

Petitioners insist that Senator Bacon's racial clauses should have been treated as "pro non scripto", and that the Superior Court should have refused to accept the City's resignation, thereby insuring that Baconsfield would henceforth exist as a park open to the people of all races. However, even in **Shelley v. Kraemer,** 334 U. S. 1, where a state court was prohibited from enforcing a restrictive covenant in a deed because that action violated a right guaranteed under a federal statute, this Court noted that such covenants "standing alone" are not invalid. Further, since Senator Bacon expressly disapproved of recreational grounds to be used by the white and negro races together (R. 21), any order that would insure a "desegregated" Baconsfield, would have violated all concepts of cy pres as understood in this country. A settlor's property could be put to a use of which he expressly disapproved only under the doctrine of the royal prerogative or sign man-

ual. But that doctrine is no part of the law of Georgia. **Jones v. Habersham**, 107 U. S. 174.

Further, it is apparent from the will that the trusteeship of the City of Macon, unlike the racial restriction, was not in Senator Bacon's mind an essential and indispensable part of his trust plan. He creates a park (R. 19) for the sole use of "white women, white girls, white boys and white children" and in the same sentence provides that the property shall never be devoted to any other purpose or use. However, he nowhere provides that Baconsfield shall have no other trustee. Nor is there anything in his trust purpose that requires a municipal trustee. Indeed, he minimized the role of the City by providing for a Board of Managers which should have (R. 19) "complete and unrestricted control and management" of the park. Further, he expresses doubt as to whether or not the City of Macon has the charter power to act as trustee (R. 24) of his trust, but he goes ahead with it, nevertheless, and provides for the contingency of the City's being unable to serve (R. 24).

Petitioners speak over and over of "discrimination" by the City of Macon in resigning the trust and by the Superior Court in accepting that resignation. However, it was Senator Bacon and not these agencies who selected the class of beneficiaries. It has been well settled since the **Civil Rights Cases**, 109 U. S. 3, that the Fourteenth Amendment forbids only that discrimination which "may fairly be said to be that of the States" (334 U. S. 13). If Senator Bacon's choice of his beneficiaries must be ascribed to the state because the state and its agencies did not prevent his making it or because they did not depart from normal principles of trust law to render it ineffective after his death, then the decision in the **Civil Rights Cases**, 109 U. S. 3, is without meaning.

Shelley v. Kraemer, 334 U. S. 1, hurts petitioners rather than helping them. There it was held that enforcement of

restrictive covenants by state courts denied persons **rights guaranteed by federal statutes.** But no law guaranteed petitioners a right to share in Senator Bacon's gift. Rather they have no "rights" in connection with Baconsfield, and their contentions based on **Shelley** amount to no more than an assertion that they may create such rights by asserting them in a state court and having them denied.

Only the "white women, white girls, white boys and white children of the City of Macon" (R. 19) have rights in connection with the facilities of Baconsfield. Nothing in the record suggests that Baconsfield affords sufficient space to accommodate all the people of Macon. Such could hardly be imagined to be the case. Thus for the Superior Court to have required the City to continue to serve as trustee would have been state action denying to those named beneficiaries of Senator Bacon solely because of their race the right to enjoy unimpaired the full benefits of his gift unshared by others in the same way that any class of beneficiaries enjoys the bounty of its settlor. This would have indeed offended the principles enunciated in **Shelley.**

Georgia Code Section 69-504 (Acts 1905, p. 157), so heavily relied upon by petitioners, and set out at page 3 of this brief, is not in our view a significant consideration. Prior to its passage a settlor could have established a trust for a park with a municipal corporation as trustee open to all races or restricted to one race. The language of 69-504 is permissive. As noted by the Supreme Court of Georgia (R. 86):

> "The law of Georgia does not by Code Section 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color, or creed . . ."

Nor was there any danger that Bacon, despite the permissive language of the statute, might have thought that

it embodied a state policy requiring separate parks for the two races since the State of Georgia had no law restricting its own parks as to race. Nor has the City of Macon ever had any municipal ordinance to that effect.

No Georgia law, then, required Senator Bacon to limit his bounty to the members of one race nor placed any burden on any person desiring to establish a park for all races. Trusts for one race have always been recognized in the case law of the states. Bacon should not be denied the right to create such a trust just because the authorization to do so in Georgia also existed in Code form.

Further, passages in the will (R. 21) give Bacon's personal reasons for the limitation of his park as to race. For this additional reason it is impossible to attribute the racial clauses to any governmental policy.

Moreover, Bacon (R. 24) expressed some doubt as to whether the City of Macon could serve as trustee for the purposes he outlined. It follows either that he was unaware of Georgia Code Sections 69-504 and 69-505, or the passages expressing that uncertainty were carried over from a will which preceded the passage of those Sections. If the latter be the case, then Bacon had in mind a racial limitation before 1905 when these Sections were enacted, for his only doubt about the City's power to serve could only have related to the fact that the trust was for only a portion of its citizens.

ARGUMENT.

I. The Private Nature of Charitable Trusts.

In **Shelley v. Kraemer**, 334 U. S. 1, this Court said:

> ". . . Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful . . ." (334 U. S. 13).

The classic expositions on the independence of the charitable trust from government is embodied in the detailed opinion of this Court in **The Trustees of Dartmouth College v. Woodward**, 4 Wheat. 518.

In that case it appeared that certain persons had given property in trust for the establishment of a school, and that in 1769 King George, III, at their request, and in appreciation of their generosity had issued his letters patent establishing the school in the Colony of New Hampshire in accordance with provisions proposed by the donors. The school was operated by a self-perpetuating twelve-man board provided for in the letters patent until 1816, when the New Hampshire Legislature, feeling that the school was inadequate to meet the needs of changing times and the increasing population of what had become the State of New Hampshire, passed an act entitled "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College."

The Act expanded the twelve-man board to twenty-one, and the board was in certain matters made subject to the veto power of a new Board of Overseers. The members

of this new Board would be appointed by the Governor and Council of New Hampshire, and high governmental officials of Vermont and New Hampshire would serve on it as ex-officio members.

The former board resisted contending that the Act violated the Constitution of the United States in that it impaired the obligations of a contract.

Daniel Webster, speaking for the legality of the Act, took the position that the College was a public institution. Further, he argued, as petitioners argue here, that the private origin of the charity might well be ignored, his reason being that the donors were dead and gone and hence unavailable to assert any interest.

The Supreme Court of the United States, however, ruled in favor of the old board and against the constitutionality of the Act. Chief Justice John Marshall, while conceding that the dead may not be said to hold an interest in property, observed that the donors were well represented by a dutiful board of trustees and said:

> ". . . Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements as to have a right in insist that those arrangements shall be held sacred . . ." (4 Wheat. 630).

To determine whether the Act complained of was an impairment of the obligations of a contract Chief Justice Marshall noted that it must be determined whether in legal contemplation the charitable trust was essentially "public" or "private":

> "The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction

of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

"But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, . . ." (4 Wheat. 629-630).

But, argued Daniel Webster, the privileges bestowed on Dartmouth College by its Charter, such as immortality and those other privileges which normally appertain to charitable trusts, had bestowed on the College such a public nature that the Act of the New Hampshire Legislature was not unconstitutional. To this argument Chief Justice John Marshall said:

". . . Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. . . . Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be

applied? This principle has never been asserted or recognized, and is supported by no authority . . ." (4 Wheat. 636-637).

The Fourteenth Amendment makes no mention of race. It forbids the states to make any purely arbitrary classification. Thus, if a charity limited as to race is not constitutional neither is one limited as to religion. This point is well put in the concurring opinion of the Supreme Court of Pennsylvania **In Re: Girard's Estate**, 386 Pa. 548, 127 A. 2d 287 (1957), at 127 A. 2d 318:

> "If the present contention of the City is correct, its effect will be catastrophic on testamentary church and charitable bequests, as well as on the law of Wills in Pennsylvania. The Constitutional prohibition against discrimination—the Fourteenth Amendment—is not confined to color; it prohibits the States from making any discrimination because of race, creed or color. It follows logically and necessarily that if an individual cannot constitutionally leave his money to an orphanage or to a private home and college for poor white male orphans, he cannot constitutionally leave his money to a Catholic, or Episcopal, or Baptist, or Methodist, or Lutheran, or Presbyterian church, or to a Synagogue for Orthodox Jews, or to a named Catholic Church or to a named Catholic priest for Masses for the repose of his soul, or for other religious or charitable purposes. That would shock the people of Pennsylvania and the people of the United States more than a terrible earthquake or a large atomic bomb."

Petitioners assert that under certain Georgia Code Sections providing parks is a governmental function, and that perhaps the Court can rule that trusts performing such functions are covered by the Fourteenth Amendment while leaving other trusts beyond the reach of that Amend-

ment. But it certainly does not follow because some parks are state owned and state operated that parks which are the subject matter of charitable trusts must be considered as having a public nature such that they too must be operated in accordance with the Fourteenth Amendment.

In **Trustees of Dartmouth College v. Woodward,** 4 Wheat. 518, Chief Justice Marshall said:

> "That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor becomes the law of the donation? . . ." (4 Wheat. 634).

The Chief Justice, of course, answered that question in the negative.

If the Fourteenth Amendment be held to apply to all trusts that perform functions also performed by government, then religious schools are at an end. However, this Court has recognized the right of such schools to an existence quite independent of public schools. **Pierce v. Society of Sisters,** 268 U. S. 510.

Petitioners argue further that Baconsfield must be considered subject to the limitations of the Fourteenth Amendment because it takes the place of a public park. But in legal contemplation the charitable trust does not take the place of a public institution. To Daniel Webster's argument on that point, Chief Justice John Marshall said:

". . . These eleemosynary institutions do not fill the place, which would otherwise be occupied by government but that which would otherwise remain vacant . . ." (4 Wheat. 647).

At page 18 of their brief, counsel for the United States argue that several privately endowed parks like Baconsfield might be established in a city thus dissuading the city from providing recreational areas of its own. Thus Negroes might have no park. But this is not borne out in experience as to playgrounds, parks, schools, libraries, hospitals or other areas of similar public interest.

In **Marsh v. Alabama**, 326 U. S. 501, relied on by petitioners, the Gulf Shipbuilding Corporation had assumed a function which is normally exercised exclusively by the state, i. e., the function of running a town where people live and carry on the full ambit of human activity. And what concerned this Court was that the Corporation as owner of the title to the entire area including the sidewalk where Grace Marsh was arrested while distributing religious literature was completely closing off the people of an entire community from the free circulation of literature:

"Many people in the United States live in company-owned towns. There people, just as residents of municipalities, are free citizens of their state and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored . . ." (326 U. S. 508).

By contrast, Senator Bacon did not put a town on his property. Petitioners say, however, that he did open it up for a park which is "inherently a part of the public life of the community". However, he specifically set out

the purposes for which his property might be used and expressly empowered (R. 19) the Board of Managers which he created with unlimited discretion to exclude at any time any person or persons of either sex, whom they might find objectionable or whose presence in the park they might deem inconsistent with or prejudicial to the use of the area for the purposes contemplated.

Nor do **Simkins v. Moses H. Cone Memorial Hospital,** 323 F. 2d 959 (4th Cir. 1963), certiorari denied 376 U. S. 938, and **Eaton v. Grubbs,** 329 F. 2d 710 (4th Cir. 1964), support petitioners' position that all private groups performing functions also performed by the state are subject to the Fourteenth Amendment.

In **Eaton** it appeared that the hospital had obtained large sums of money from the United States pursuant to an act which provided that funds should be distributed on the basis of need without regard to race. Even more important was the fact that the City and County there involved had granted the building and lands to the hospital board with a reverter clause by which the property would revert to them if it ceased to be used as a hospital. Thus the City and County rather than a private testator put this property in use as a hospital. The Fourth Circuit likened this situation to the lease in **Burton v. Wilmington Parking Authority,** 365 U. S. 715.

In **Simkins,** the Fourth Circuit said:

> "By far the most significant governmental contact of these two hospitals is their participation in the federally assisted Hill-Burton hospital system . . . We deal here with the appropriation of millions of dollars of public monies pursuant to comprehensive governmental plans . . ." (323 F. 2d 962, 967).

Of course the deterring effect on prospective settlors of charitable trusts of a decision such as is desired by peti-

tioners would be stultifying. As Chief Justice Marshall also observed in **The Dartmouth College Case**:

> ". . . It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature . . ." (4 Wheat. 647-648).

And Justice Storey concurring said:

> ". . . who ever thought before, that the munificent gifts of private donors for general charity became instantaneously the property of the government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments; and we should find as little of public policy as we now find of law to sustain it" (4 Wheat. 672).

Nor in calculating the damage to the law of charities does it matter whether the law that impairs the operation of a charitable trust in accordance with the will of the donor is one passed after his death or one in existence at the time of writing his will but given an interpretation absolutely unforeseeable at the time of the execution of his said will.

In this connection, we note that petitioners conceded in their "Intervenors' Petition" in the Superior Court

of Bibb County, Georgia (R. 41) that Bacon's will was valid when written and that Baconsfield might then be legally operated for the exclusive benefit of white persons. Since the wording of the Fourteenth Amendment has not changed since 1914, we understand petitioners to argue in substance that this trust is a victim of changing times. Neither the brief of petitioners nor that of the United States suggests that the Fourteenth Amendment was **intended** to include charities.

And if an essential feature of a will may be rendered unenforceable in the name of the Fourteenth Amendment, no reason appears why such a result will not obtain in future cases having no connection with that Amendment.

At page 27 of their brief petitioners assert that if the State of Georgia acting through its legislature or courts had determined that the operation of parks for only one race was unlawful Baconsfield would not exist in its present form. That is certainly true. It is also true that Baconsfield would not exist at all in any form, for the testator expressly disapproved of park areas to be used by the white and negro races together (R. 21). This illustrates one good reason for holding the Fourteenth Amendment to be inapplicable to charities. A decision such as is desired by petitioners would simply prevent the creation of trusts by persons who want to benefit only the members of one race. A trust benefiting some people is, we submit, better than no trust at all.

To comment further on the repeated use of the word "public" by petitioners and by the United States, it seems that throughout their briefs they move imperceptibly from the notion that a privately created trust is a public charity to the idea that it somehow partakes of public property or of a governmental character. While the term "public charity" has been variously defined it certainly denotes something other than a governmental

tie.[4] The word "public" in this sense has reference to the indefinite nature of the class of beneficiaries.[5]

Respondent members of the Board of Managers of Baconsfield do not suppose, of course, that the members of this Court, if contemplating the creation of a park by a will, would insert a racial limitation. The question, though, is not what seems wise or reasonable or desirable to the Court as men, but what is legal. In **Vidal et al. v. Girard's Executors**, 2 How. 127, Daniel Webster attacked the Girard trust partly on the ground that Stephen Girard had forbidden visits by ecclesiastics, missionaries, and ministers of any sect and the teaching of any sectarian dogma at the College. This, said Daniel Webster, was contrary to the common law and the public policy of Pennsylvania.

Justice Storey speaking for a Court which was unanimous in upholding the will said in response:

> "In considering this objection, the Courts are not at liberty . . . to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we

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[4] The tax exemption clause of the Georgia Constitution uses the term "public charity" whereas the federal tax statutes refer merely to "charitable" contributions, gifts, bequests, etc. However, in legal terminology "charity" and "public charity" mean the same thing. The word "benevolent" may include private benefactions beyond the accepted scope of charity or public charity, whereas charity as a legal term excludes and distinguishes private benefactions. See *St. Louis Union Trust Co. v. Burnet*, 59 F. 2d 922. (8th Cir. 1932.)

[5] Webster's New International Dictionary, Second Edition, at page 453 under the topic "charity" speaks of:

> "An eleemosynary gift; a gift, as by grant or devise, of real or personal property to the use of the public or any portion of it (as distinct from specific individuals) for any beneficial or salutary purpose . . ."

at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions and upon which men may and will complexionally differ . . ." (2 How. 198-199).

II. The Georgia Courts Were Right in Not Applying Cy Pres as Requested by Petitioners.

In the footnote on page 29 of their brief, counsel for the United States indicate that while they consider that Baconsfield may not be operated exclusively for white persons, they think it would be "premature" for this Court to consider whether the present trustees may close the park, or whether the heirs of Senator Bacon may obtain the property by reversion and use it for non-park purposes. We are entirely in accord with that statement, especially since the Georgia Supreme Court has not addressed itself to either question. As already noted the Georgia Supreme Court has not even expressed itself on whether the present Board of Managers may operate Baconsfield in accordance with the will with private trustees holding the legal title. Further, it is not certain whether either or both of those possibilities would ever be raised even if this Court should rule that Baconsfield may not be operated in accordance with the will. Nor do we see how either possibility could raise a federal question.

However, petitioners seem to go beyond the question of whether or not Baconsfield may be operated in accordance with the will, since they argue that the Superior Court

should have treated the racial limitation as being utterly void and have granted them relief which would insure the future of Baconsfield as a park open to all races. At page 15 of their brief they speak of treating the racial limitation as "pro non scripto", and they argue that it should be disregarded, and that the City should have been compelled to remain as trustee. Thus in effect they are saying that the trust should have been declared unenforceable as written, and the cy pres doctrine should have been applied to insure the future of Baconsfield as a park open to all races.

However, there is no merit in the contention of petitioners made at page 21 of their brief that the racial clauses should be disregarded as blatantly violating the Fourteenth Amendment. Even in **Shelley v. Kraemer**, 334 U. S. 1, where state courts were precluded from enforcing a racial clause in a deed because that action would have denied the rights of a Negro to buy property from a willing seller, a right guaranteed by the Civil Rights Acts of 1866 and 1870, this Court said:

> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." (334 U. S. 13.)

In order to "desegregate" Baconsfield petitioners must not only have a ruling by this Court that the park may not be operated in accordance with the will, but they must also have a ruling from the Georgia courts that as a matter of Georgia property law cy pres can be applied to Baconsfield, and that it may be applied in such a way that the property would continue as a park but with the racial

limitation eliminated. Petitioners did request the Superior Court of Bibb County to apply cy pres in a manner which would eliminate the racial limitation (R. 41), and they did contend in their Bill of Exceptions in the Supreme Court of Georgia that this should have been done (R. 2). However, there is no merit in their complaint made in this Court that the Georgia courts acted wrongly in not making that application of cy pres.

Of course, under the law of Georgia as well as that of all other states, the question of whether or not the doctrine of cy pres can be applied arises only when it is shown that a charitable trust is not capable of execution in the exact manner provided by the settlor. The Supreme Court of Georgia did not reach that conclusion (R. 87). Hence it quite properly declined to consider petitioners' position on cy pres. That Court further noted (R. 87) that it was doubtful whether those who are petitioners here could, as intervenors in the Superior Court of Bibb County, raise the question as to the appropriateness of applying cy pres.

Moreover, there are additional complications in relation to any attempt to apply cy pres in the manner outlined by petitioners. That doctrine as understood in this country is an intent enforcing doctrine. Closely allied to that idea is the further notion embodied in the jurisprudence of all the states that cy pres can be applied only where there is expressed a general charitable intent.

Georgia Code, Section 113-815, reads as follows:

> "Charitable devise or bequest. Cy pres doctrine, application of.—A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by ap-

proximation, effectuate the purpose in a manner most similar to that indicated by the testator."

In most of the cases that have arisen in Georgia and elsewhere where some portion of a testator's purpose has been frustrated, what has become impossible of accomplishment is not an essential element of the trust but only a mode of fulfilling some more general purpose of the settlor. Thus the doctrine cy pres is applied to accomplish the general purpose by a different mode than was prescribed. However, where a settlor prescribes a plan for benefiting a limited part of the public in a very particular way by a detailed plan which he outlines, and expresses no desire to benefit mankind in some more general way, then no general charitable intent is manifested, and cy pres is inapplicable. **Adams v. Bass**, 18 Ga. 130 (1855): **City of Danville, Ky. v. Louise Caldwell**, 311 S. W. 2d 561 (1958); **Industrial National Bank v. Isabel Drysdale et al.**, 114 A. 2d 191 (1955); **First Universalist Society of Bath v. Swett et al.**, 148 Me. 142, 90 A. 2d 812 (1952); **Teele v. Bishop of Derry et al.**, 168 Mass. 341, 47 N. E. 422 (1930); **Shannep v. Strong**, 160 Kan. 206, 160 P. 2d 683 (1945); **Women's Christian Temperance Union of El Paso et al. v. Cooley**, 25 S. W. 2d 171 (1930); **Murr v. Youse**, 52 Abs. 321, 80 N. E. 2d 788 (1946), and **Hampton et al. v. O'Rear et al.**, 309 Ky. 1, 215 S. W. 2d 539 (1948).

This Court in reviewing a case from the Supreme Court of the District of Columbia enunciated these same principles in **Hopkins v. Grimshaw**, 165 U. S. 353 (1897):

> "A grant for the maintenance of a churchyard or burial ground in connection with a church or religious society, or of a public burial ground, or a burial ground of all persons of a certain race, class, or neighborhood, might be considered as in the nature of a dedication for a pious and charitable use . . . If it be assumed, however, as most favorable to the defendant,

that this deed created a charitable trust, it was not a grant indicating a general charitable purpose, and pointing out the mode of carrying that purpose into effect; thus coming within the class of cases in which courts of chancery, when the particular mode had failed, have carried out the general purpose . . . But the trust was restricted, in plain and unequivocal terms, to the particular society to be benefited, as well as to the purpose of a burial ground; adding (as if to put the matter beyond doubt) 'and for no other purpose whatever.' The trust would end, therefore, at the latest, when the land ceased to be used as a burial ground, and the society was dissolved . . ."

Beyond Bacon's very specific, detailed plan for a park for "the white women, white girls, white boys and white children of the City of Macon" (R. 19), his will evidences no more general plan to benefit mankind. He provides for a park for that limited class and then states:

". . . the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized . . ." (R. 19).

However, even if at some future time the question of whether or not to apply cy pres should arise, and even if the Georgia courts should find a general charitable intent expressed and apply cy pres, it is possible that Bacon's property would cease to be used as a park but would be sold and the fund used for some other charitable purpose. A "desegregated" park might well not be found to be the nearest approximation of his intent in view of his express disapproval of recreational grounds to be used by both races together (R. 21).

While no Georgia case has ever decided whether a racial limitation in a gift of a park in trust to a city

as trustee for the persons of one race was in the settlor's mind an essential and indispensable part of the trust plan, the Supreme Court of Michigan held that an unambiguous racial limitation in a gift to a City of property for a "playfield" for white children might not be eradicated through the application of cy pres. This result obtained in **La Fond v. City of Detroit,** 357 Mich. 362, 98 N. W. 2d 530 (1959), though the testatrix there placed far less emphasis on the racial restriction than did Mr. Bacon.

It would appear that the "desegregation" of Baconsfield could never be accomplished by applying any concept of cy pres as understood in the law of any state in this country. Indeed, the result desired by petitioners could be obtained only by returning to our jurisprudence the rightfully despised doctrine of the royal prerogative. That doctrine is described in **4 Scott, Trusts,** page 2829, Section 399.1 (2d ed. 1956):

> "The exercise of the prerogative power by a biased or cynical or whimsical king sometimes resulted in devoting the property of the testator to purposes of which he never would have approved, purposes which might run entirely counter to his wishes . . ."

However, it is well established by **Jones v. Habersham,** 107 U. S. 174, that the royal prerogative or sign manual is not part of the jurisprudence of Georgia:

> ". . . the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised . . ."

Scholars who wish to point out the obvious evils of the doctrine of the royal prerogative cite as the classic case of injustice, **Da Costa v. De Pas,** 1 Amb. 228, 2 Swanst. 487 (1754), where under the sign manual prop-

erty of a Jewish testator left in trust to establish an assembly for reading Jewish law was diverted by the authority of the Crown to the advancement of the Christian religion.

Bacon's great emphasis on his racial limitation and his express disapproval of recreational areas to be used by the members of both races together and in common show that a "desegregated" park area would indeed be as contrary to his wishes as the final disposition in **Da Costa v. De Pas** would have been to the testator in that case:

> "I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common . . ." (R. 21).

III. The Trusteeship of the City, Unlike the Racial Limitation, Was Not Essential in the Mind of Mr. Bacon.

At page 20 of their brief petitioners say that Bacon expressed a choice for a racial limitation and also a choice for the City of Macon to serve as trustee and did not say which of these he would choose to retain and which to lose, if he could not have both. From this they reason that in the resignation of the City of Macon the City and the Georgia courts made a choice for Mr. Bacon without any guidelines from the testator, and that it is these state agencies, therefore, which must be credited with the choice in favor of the racial clauses.

But this contention is absolutely devoid of merit. The guidelines are there, and the choice was that of Senator Bacon. Normal rules of testamentary construction show that he placed greater emphasis on his class of beneficiaries than on the identity of his trustee or trustees.

He creates a park for the sole use (R. 19) of "white women, white girls, white boys and white children" and in the same sentence provides that the property is at no time for any reason to be devoted to any other purpose or use except as specifically authorized. Thus he says that his property shall be put to no other use, but by contrast he nowhere says that it shall under no circumstances have a different trustee. Nor is there anything in his trust purpose that requires a municipal trustee. Indeed, he minimizes the role of the City by providing for the Board of Managers which shall at all times have (R. 19) "complete and unrestricted control and management" of the property. Thus the City is no more than a passive title holder, while the Board of Managers composed of private citizens operates Baconsfield.

Further, the Senator expressly disapproves of recreational grounds to be used in common by the white and negro races (R. 21). He does not, however, expressly or impliedly disapprove of charitable trusts with private trustees.

Certain passages of the will make it clear that the trusteeship of the City, unlike the racial limitation, was not an essential and indispensable part of the trust plan. He expresses doubt as to whether or not the City of Macon has the charter power to act as trustee (R. 24) of his trust but he goes ahead with it, nevertheless, and provides for the contingency of the City's being unable to serve (R. 24). He also makes reference (R. 19) to the Mayor and Council of the City of Macon or "their successors in said trust."

We submit the conclusion is inescapable that Bacon would have preferred to lose the passive trusteeship of the City than the racial limitation. The question is, of course, the relative importance of these two matters in

the mind of the testator and not in the mind of someone else or in the minds of this Court.[6]

Nor do petitioners correctly construe the provisions of the will which they quote at page 17 of their brief. Those provisions against a sale or disposal of the property do not preclude a change in trustee but are obviously intended only to forbid the City or any successor trustee or trustees from diverting the property to some other use than that specifically authorized, i. e., from treating the property as though it were owned in fee simple absolute. The rest of that sentence reads, "or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized" (R. 19).

IV. The Acceptance of the City's Resignation as Trustee Was Necessary and Proper.

Petitioners make further argument that the trusteeship of the City of Macon has by some process of administrative osmosis bestowed on Baconsfield such a public char-

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[6] It is significant that the Pennsylvania courts in the *Second Girard College Case*, i. e., *In Re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958), appeal dismissed and certiorari denied, 357 U. S. 570, following normal rules of testamentary construction found the racial clause in the will of Stephen Girard more essential than the trusteeship of the Board of City Trusts which had taken over the trust from the City of Philadelphia named by Girard as trustee. It is obvious that the Girard will places far less emphasis on the racial limitation and far more emphasis on a governmental trustee than does the Bacon will.

As to Girard's emphasis on his desire for a governmental trustee Justice Musmanno dissenting *In Re Girard's Estate*, 127 A. 2d 287, at 330 said:

> ". . . Girard was so determined that the whole project be governmental that he directed that if the City of Philadelphia failed to carry out his instructions, the Commonwealth of Pennsylvania would become the successor in title, and if the Commonwealth was also indifferent to its obligations under the will, the estate would then become the property of the United States of America. What more could a person do to demonstrate the undeviating public character of the trust?"

acter that it must now be viewed as subject to the Fourteenth Amendment. And presumably they argue that being subject to the Amendment, the trust must have a municipal corporation as trustee, and that therefore the Superior Court of Bibb County might not accept the City's resignation.

We know of no case where the character or nature of a trustee eroded away an essential element of a trust's purpose. A trust does not become molded in the image of the trustee, but rather if a trustee because of its nature becomes incapable of carrying out the trust, this calls **not** for a modification of the trust but for a change in trustee. This principle applies where the trustee is a municipal corporation. In **Vidal et al. v. Girard's Executors**, 2 How. 127, it was argued that changes in the nature of the corporate entity of the City of Philadelphia made the Girard trust unenforceable since the City could no longer act as trustee. To this argument this Court said:

> ". . . It is true that, if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust . . ." (2 How. 188).

Nor can it matter so far as the enforceability of the trust is concerned that the City of Macon continued to serve as trustee for several years after this Court's decision in the **First Girard College Case**, i. e., **Commonwealth of Pennsylvania v. Board of Directors of City Trusts**, 353 U. S. 230. How can a trustee affect the validity of a trust

by a negligent failure to react to constitutional developments? If a trustee could so affect a trust, it might well react slowly by design and thereby expand a class of beneficiaries.

It was quite proper for the Mayor and Council of the City of Macon to resign as the trustee of Baconsfield. Indeed the **First Girard College Case** requires that Baconsfield have a new trustee since under that decision property may not be operated for the sole benefit of one race where there is a governmental trustee. Of course, nothing about this Court's decision in that case, i. e., in the **First Girard College Case**, where a governmental body served as trustee of a trust for poor male white orphans, precluded a change in trustee.

In fact, after this Court's decision the Orphans' Court of Philadelphia removed the governmental trustee, the Supreme Court of Pennsylvania affirmed this action in **In Re: Girard College Trusteeship**, 391 Pa. 434, 138 A. 2d 844 (1958), and this Court dismissed an appeal and denied certiorari, 357 U. S. 570.

Nevertheless, petitioners argue that the City might not resign as trustee of Baconsfield. Presumably they hope to "desegregate" Baconsfield by the unusual procedure of freezing the City to its post as trustee and then relying on the principle in the **First Girard College Case**. Thus, while not carrying the burden of showing how petitioners could possibly have acquired an interest in Senator Bacon's gift, they will be able to say that negro citizens have gained "rights" by indirection, since the true beneficiaries will be powerless to assert their right to that undiminished use of the limited facilities of Baconsfield to which they are entitled under the will.

It is claimed that the City had to resist its removal though the continued execution of the trust it had sworn

to uphold was thwarted by its continued service. In substance, then, petitioners go beyond arguing that the State may not discriminate and say that the State must help to expand or preserve the areas of its presence to help some of its citizens muster and support arguments for state involvement against others in situations which are not peculiarly the subject matter of state responsibility. Such is not the law.

It is true that the State may not discriminate, but the Fourteenth Amendment does not require that the State or its agencies prevent discrimination by private individuals. The class of beneficiaries of this trust was chosen by Bacon and not by the City or the Superior Court or any other governmental agency. If Bacon's choice be deemed that of the State because the State did not prevent his making it or render it ineffective after his death, then this Court's decision in the **Civil Rights Cases**, 109 U. S. 3, is meaningless.

Further, even if the cy pres power could be appropriately applied to eliminate the racial limitation, this would be the function of a court and not of the Mayor and Council.

V. Shelley v. Kraemer Does not Support the Position of Petitioners.

Petitioners say **Shelley v. Kraemer**, 334 U. S. 1, required Bibb Superior Court to refuse to allow the City to resign as trustee. This reliance is misplaced. Nor would that case have precluded the Superior Court from removing the City as trustee.

It is true that the action of a state court is state action. That is well settled. The fallacy in the argument of petitioners is that this action of Bibb Superior Court did not deny them any right to which they are entitled. One

must have a right before one may have it denied. The Fourteenth Amendment created no new rights in one citizen against another. **United States v. Cruikshank,** 92 U. S. 542, 554; **United States v. Harris,** 106 U. S. 629, 638; **James v. Bowman,** 190 U. S. 127, 136; **Collins v. Hardyman,** 341 U. S. 651, 658. And no person has any "right" to participate as a beneficiary of a charitable trust where he is not within the class named by the settlor to enjoy the fruits of his bounty. A fortiori he has no right to contest the resignation of a trustee.

In **Shelley v. Kraemer** there was involved the right of a Negro citizen to buy property which the owner desired to sell him, a right guaranteed by the Civil Rights Acts of 1866 and 1870.

Reliance on the Civil Rights Acts is apparent from the opinion in **Shelley:**

> "Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution **and Acts of Congress passed pursuant to that Amendment** . . ." (334 U. S. 7). (Emphasis supplied.)

The Civil Rights Act of 1866, now 42 U. S. C., Section 1982, which was reenacted in Section 18 of the Act of May 31, 1870, provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

As recently as Mr. Justice Black's opinion in **Bell v. Maryland,** 378 U. S. 226, it was recognized that:

". . . Nearly all the briefs in **Shelley** which asked invalidation of the restrictive covenants iterated and reiterated that judicial enforcement of this system of covenants was forbidden state action because the right of a citizen to own, use, enjoy, occupy and dispose of property is a federal right protected by the Civil Rights Acts of 1866 and 1870, validly passed pursuant to congressional power authorized by Section 5 of the Fourteenth Amendment . . ." (378 U. S. 329).

Thus we see that what **Shelley** condemns is not that a state court merely denies a claim by persons who make it as members of a particular racial or religious group. Rather what is forbidden is for a state court to take an action on the basis of race or some purely arbitrary classification which denies persons rights to which they are entitled. The contention of petitioners that they have acquired "rights" to participate in Bacon's trust because the Superior Court of Bibb County did not command the City of Macon to serve as trustee amounts to no more than a bald assertion that one may create rights by asserting them in a state court and having them denied. Or stated differently, their position is that when persons make claims in a state court as members of a particular race, they must win or the Constitution is violated.

To the extent that **Shelley v. Kraemer,** 334 U. S. 1, is involved here it hurts petitioners rather than helping them. It must be remembered that the doctrine of **Shelley** protects the rights of all persons. In **Bell v. State of Maryland,** 378 U. S. 226, where this Court split three ways, Mr. Justice Black stated in a dissenting opinion in which Mr. Justice Harlan and Mr. Justice White concurred:

". . . But petitioners here would have us hold that, despite the absence of any valid statute restricting the use of his property, the owner of Hooper's Restaurant in Baltimore must not be accorded the same

federally guaranteed right to occupy, enjoy, and use property given to the parties in **Buchanan** and **Shelley**; instead, petitioners would have us say that Hooper's federal right must be cut down and he must be compelled—though no statute said he must—to allow people to force their way into his restaurant and remain there over his protest. We cannot subscribe to such a mutilating one-sided interpretation of federal guarantees the very heart of which is equal treatment under law to all. We must never forget that the Fourteenth Amendment protects 'life, liberty, or property' of all people generally, not just some people's 'life,' some people's 'liberty,' and some kinds of 'property.' " (378 U. S. 331-332.)

Nothing in the record suggests that Baconsfield affords sufficient space to accommodate all the people of Macon. Such could hardly be imagined to be the case. Thus, it follows that any right created in negro citizens of Macon to use this land must impair to some extent the use of this land by the "white women, white girls, white boys and white children of the City of Macon". These last named persons are the only persons having rights in Bacon's gift (R. 19) which require protection. For the Court to have required the City to serve as trustee would have been state action denying to those named beneficiaries solely because of their race the right to enjoy unimpaired the full benefits of Bacon's gift unshared by others in the same way that any class of beneficiaries enjoys the bounty of its settlor. Surely such action would have violated the rule in **Shelley v. Kraemer**, 334 U. S. 1.

VI. Georgia Code, Sections 69-504, 2-5404 and 92-201 Are Not Significant Considerations.

The attempt of petitioners to have Georgia Code, Section 69-504 (Acts 1905, p. 117), viewed as playing a significant

part in the creation of Senator Bacon's racial limitation will not bear analysis.

In 1904, the year prior to the passage of that statute, a testator in Georgia could obviously have created a trust involving a park with a municipal corporation as trustee without inserting any racial restriction. Or he could have created such a trust with a racial restriction. In both connections we point out first that while no Georgia case had dealt with a charity involving a park, such trusts had been recognized in other states. **In Re Smith Estate**, 37 A. 114 (1897). Indeed, petitioners concede that parks were properly the subject matter of charitable trusts at common law and cite several cases on that point at page 12 of their brief. Secondly, Georgia Code, Section 69-502 (Acts 1892, page 104), provided:

> "May act as trustees—The incorporated towns and cities may act as trustees under any conveyance or will donating or giving property for charitable or eleemosynary purposes."

Thus we see that unless Section 69-504 destroyed the previously existing right of Bacon to establish a park for both races, he was free to make his own choice as to the recipients of his gift.

And as the Supreme Court of Georgia noted in its opinion (R. 86):

> "The law of charities is fully adopted in Georgia . . . **Jones v. Habersham**, 107 U. S. 174 (5), (2 S. C. 336, 27 L. E. 401). Under the law of this State any person may, by will, grant, gift, deed, or other instrument, give or devise property for any charitable purpose . . . The contention by counsel for the plaintiffs in error that Code Section 69-504 required A. O. Bacon to limit the use of Baconsfield to the members of one race can not be sustained. Code Section 69-504,

in providing for gifts limited to members of a race, simply states that any person **may** 'devise, give, etc.' The law of Georgia does not by Code Section 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color, or creed . . ." (Emphasis is that of the Georgia Supreme Court.)

Petitioners argue, however, that Bacon had no such construction of the statute before him in 1911, and that he may have been in doubt as to whether or not it did not **require** racial separation. But this statute is not confusing or bewildering in the least. Why would Bacon interpret the word "may" as being mandatory?

The weakness of petitioners' position becomes the more apparent, when we realize that the State of Georgia at no time required the maintenance of separate state or city owned parks for the two races. Such parks were always open to both races. Of course, Code Section 69-504, the only Georgia Code Section involving parks which mentions race, does not deal with state owned parks at all, and while it deals with city owned parks acquired by a private gift as well as with gifts in trust, it does not deal with the vast majority of city parks which are established by other means. The statement at page 23 of petitioners' brief to the effect that Georgia has or had a policy of excluding one race or the other from all public parks is a gross inaccuracy. Nor could Georgia Code Section 69-504 possibly be viewed as "an awesome portent that Georgia would not tolerate unsegregated parks" as suggested at page 11 of the brief of petitioners. On the contrary Georgia's parks have never been restricted as to race.

Nor, we might mention, has the City of Macon ever had any municipal ordinance requiring separate parks for the white and negro races.

Why should Senator Bacon have placed an unnatural, mandatory construction on Section 69-504 and read it as a state requirement that parks set up as private trusts must be limited to one race when the state's own parks were not so limited?

Petitioners assert further that even if the statute did not raise doubts in Bacon's mind as to whether or not it might be mandatory, it is still significant because it made a change in the common law by elevating parks for one race to the position of a charity. There have been only a few cases dealing with charities involving parks and only a few more cases involving charities limited as to race. Thus, whatever significance may be attributed to the point, it is not surprising that there may not be any cases expressly recognizing as charitable a park for one race. There is no logical reason, however, to suppose that such a charity would not have been recognized at common law if the occasion had arisen. **4 Scott, Trusts**, page 2715, Section 375.2 (2d ed. 1956), cited by petitioners, does not support petitioners' contention based on it that only trusts for educational or religious purposes or for aid of the poor could be limited to a restricted class:

> "But a trust unconnected with the relief of poverty or the advancement of education or religion or health in order to be charitable must be for the benefit of a larger class than need be benefited if the trust is connected with such purposes . . ."

But, of course, Bacon's class of beneficiaries is a very large one.

Petitioners argue at page 7 of their brief that his preference for a racial limitation "if any" must be disregarded.

First we note that their expression of doubt about his desire to limit his park to white persons is startling in the

extreme. Bacon spoke of Baconsfield as being for the use, benefit and enjoyment of "the white women, white girls, white boys, and white children of the City of Macon" (R. 19). For the control, management, preservation and improvement of the property he created a Board of Managers "consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons" (R. 19). The Board of Managers should have the power to admit "the white men of the City of Macon, and white persons of other communities" (R. 20). He further states (R. 21):

> "I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common . . ." (R. 21).

Finally, after noting (R. 21) that Baconsfield shall be a memorial to his deceased sons, he says (R. 24):

> ". . . As there will be no one of my descendants who now bears my name either by right or birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community of which they once formed a happy part."

But petitioners say his intent must be disregarded, however plain it may be that he acted quite independently of Georgia Code, Section 69-504.[7] However, as already noted,

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[7] Over and over petitioners argue that though Senator Bacon gave personal reasons for his decision to benefit only white persons, that still he must have known about Georgia Code, Sections 69-504 and 69-505, and somehow that must be significant. But see again the passages of the will (R. 24) where he provides

the law of Georgia did not require a testator to limit his bounty to the members of one race, nor did it place any burden on one who desired to create a park for all races. Trusts for one race have always been recognized in the case law of the states. Why should Bacon be denied the right to create such a trust just because the authorization to create such trusts in Georgia also existed in Code form.

At page 28 of their brief, petitioners assert that since 1918 Georgia has conditioned tax exemptions on the maintenance of racial restrictions in the operation of charitable trusts, quoting in part from Georgia Code, Sections 2-5404 and 92-201 mentioned there and set out in full at pages 3 and 4 of their petition for certiorari. This is a rather extreme exercise of literary license. The actual language from which the conclusion is drawn follows language exempting from taxation properties of "all institutions of purely public charity", as well as other specified properties, including (1) all public property, (2) places of religious worship or burial, (3) intangible personal property owned by or irrevocably held in trust for the ex-

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that if it be held that the City of Macon has not the legal power under its charter to hold his property in trust for "the purposes specified", appropriate legislation be obtained to bestow that power upon the City. But Georgia Code, Sections 69-504 and 69-505 set out at page 3 of petitioners' brief expressly recognized the power of any municipality in Georgia to serve as trustee for such purposes. It is obvious that Bacon didn't know of those two sections when he drafted the passages above mentioned, and it is very reasonable to conclude that those passages were lifted from an earlier draft of his will completed before the passage of those two companion sections. Thus any similarity between the wording of his will and that of the statute most probably demonstrates that the statutes were patterned to fit his will rather than the other way around. His concern about the extent of municipal power to act as trustee undoubtedly reflected a degree of uncertainty in his mind as to whether the City could serve as trustee for only a part of its citizens. Thus we see either that the racial limitation was in his mind before 1905 when the two Code Sections were enacted, or that, if the passages were written after their enactment, the Senator was not familiar with them.

clusive benefit of religious, educational and charitable institutions, and (4) buildings erected for and used as a college, non-profit hospital, incorporated academy or other seminary of learning, including funds or property held or used as endowment by such colleges, non-profit hospitals, incorporated academies or seminaries of learning, provided the same is not invested in real estate; to which is added: "provided, further, that all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people shall be limited to colored people."

This proviso was added by amendment in 1918 to the Constitution of 1877 and was brought forward into the Constitution of 1945. To the extent that it has any meaning it seems to limit the use of **endowments** of existing institutions, but it has never been applied or enforced in Georgia or interpreted by the courts of Georgia except as it came before the Supreme Court of Georgia in 1962 in the case of **Emory University v. Nash**, 218 Ga. 317, 127 S. E. 2d 798 (1962), on the petition of Emory University for a declaratory judgment. In that case the Georgia Supreme Court said that the proviso quoted above was so inconsistent with a preceding proviso relating to colleges, non-profit hospitals, incorporated academies or other seminaries of learning as to be irreconcilable and that the two irreconcilable provisos completely neutralize and destroy each other. In a special opinion Presiding Justice Head concurred on the ground that the proviso was so vague and uncertain as to totally defeat the purported limitation. More specifically, Justice Head said:

> ". . . The third proviso (quoted above) being incapable of any legal construction as applicable to the exemption from taxation, and being otherwise in conflict with the body of the act, if construed as

limiting the exemption granted, the proviso must fall, and the body of the act must prevail . . ." (127 S. E. 2d 803).

We confess with Justice Head that we do not know what the proviso meant, or means, but at most it appears to proscribe a misapplication of endowment funds rather than racial segregation or desegregation. It certainly does not justify the statement in petitioners' brief that Georgia has conditioned tax exemption on the maintenance of racial restrictions in the operation of charitable trusts.

Since Bacon wrote his will in 1911 and died in 1914, and the proviso in the Constitution and statutes pursuant thereto making reference to race were enacted subsequently in 1918, they apparently are not cited for any influence they may have exerted upon him. Even if the provisos have the construction placed upon them by petitioners they would simply be a nullity. Further, since a state may not alter a trust by deliberate legislation aimed at such a result, **Trustees of Dartmouth College v. Woodward**, 4 Wheat. 518, Georgia certainly could not affect the validity of Bacon's trust indirectly by the passage of a tax exemption statute after his death having the construction which petitioners place upon this one.

We have no construction of these statutes by the Georgia courts in this case, since petitioners mentioned them for the first time in their petition for certiorari.

All in all, our reaction to this case is much like that expressed by the Supreme Court of Pennsylvania in the **Second Girard College Case**, i. e., **In Re Girard College Trusteeship**, 391 Pa. 434, 138 A. 2d 844, appeal dismissed and certiorari denied 357 U. S. 570, when it said:

"The appellants' effort to make a 'segregation' issue out of Stephen Girard's private charity, merely

because of the inability of the Board of City Trusts, as trustee, to comply with the donor's express directions, serves only to confuse and obscure the real issue involved as to the right of a private individual to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced." (138 A. 2d 847.)

CONCLUSION.

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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